

IN THE SUPREME COURT OF THE STATE OF MONTANA  
Case No. OP 16-0555

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ATLANTIC RICHFIELD COMPANY,

Defendant and Petitioner,

v.

MONTANA SECOND JUDICIAL DISTRICT COURT, SILVER BOW  
COUNTY, THE HONORABLE KATHERINE M. BIDEGARAY,

Respondent.

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**PETITIONER'S OPENING BRIEF**

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*An Original Proceeding Arising From Rulings In The Second Judicial District  
Court, Silver Bow County, Cause No. DV-08-173BN  
Honorable Katherine M. Bidegaray, District Court Judge*

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Defendant and Petitioner Atlantic Richfield Company ("Atlantic Richfield"), pursuant to M. R. App. P. 14(10), and this Court's October 5, 2016 Order, hereby submits its opening brief in support of its Petition for Writ of Supervisory Control ("Petition").

### **STATEMENT OF THE ISSUES**

Does the federal Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") bar Plaintiffs' common-law claim for restoration damages?

### **STATEMENT OF THE CASE**

CERCLA, also known as the "Superfund" law, does not prohibit all claims for property damages at a Superfund site, and it does not affect most of Plaintiffs' claims in this case. CERCLA does, however, bar Plaintiffs' restoration claim because it challenges a remedy selected by the United States Environmental Protection Agency ("EPA") and depends upon imposing a different remedy that EPA has not approved. In this case, Plaintiffs' properties are located within the boundaries of the Anaconda Smelter Superfund Site ("Site"), where cleanup has been directed by EPA under its CERCLA authority for over thirty years. Plaintiffs allege their properties were damaged by pollution from historical operations of the Anaconda Smelter. Plaintiffs pursue a claim for restoration damages, which requires proof that they will actually perform their proposed restoration remedy.

But Plaintiffs' restoration plan—which involves excavating massive amounts of soil and constructing miles of underground walls large enough to change groundwater flow—conflicts with EPA's selected remedy for the Site and has been expressly rejected by EPA. Plaintiffs' restoration claim is therefore barred by CERCLA.

CERCLA is designed to facilitate orderly and effective environmental cleanups overseen by federal and state regulators with expertise in such matters. EPA selects a CERCLA remedy after extensive study of alternatives in a public process. A CERCLA remedy must be fully protective of human health and the environment and must include periodic reviews to ensure the remedy remains protective. Allowing concurrent private-party remedies that conflict with an EPA-selected remedy would obstruct the CERCLA process and could exacerbate the contamination problem. For this reason, CERCLA prohibits interference with EPA's chosen remedy primarily by (1) barring court "challenges" to the EPA-sanctioned CERCLA cleanup under § 113, and (2) requiring that all cleanup activity on an EPA-supervised site be expressly approved by EPA under § 122(e)(6). Plaintiffs' claim for restoration damages violates both provisions.

Plaintiffs criticize EPA's regulatory decisions and request a ruling from the district court that Plaintiffs' restoration remedy should be performed at the Site, even though their proposed remedy conflicts and would interfere with EPA's

selected remedy. And Plaintiffs want Atlantic Richfield to pay for their conflicting remedy even as Atlantic Richfield is complying with EPA orders to perform and pay for the EPA remedy at the Site—including on Plaintiffs' properties. Atlantic Richfield so far has spent over \$400 million implementing EPA's remedy at the Site, and the cleanup is ongoing.

Plaintiffs' restoration claim necessarily depends upon a judicial finding that they can and will perform their preferred remedy with any money awarded. Indeed, to obtain restoration damages under Montana law, the jury must find that Plaintiffs actually will perform their proposed restoration. But Plaintiffs cannot and will not perform their restoration plan because CERCLA categorically prohibits it. Only EPA has the authority to select the environmental remedy at a Superfund site and to compel a responsible party to perform or pay for that remedy. Plaintiffs may not usurp this exclusive federal authority under the guise of a state-law claim.

The district court erred in denying Atlantic Richfield's motion for summary judgment on Plaintiffs' restoration damages claim as barred by CERCLA. This Court should grant the Petition and reverse the district court.

## **STATEMENT OF THE FACTS**

### **I. The CERCLA statutory framework**

“As its name implies, CERCLA is a comprehensive statute that grants the President broad power to command government agencies and private parties to clean up hazardous waste sites.” *Key Tronic Corp. v. United States*, 511 U.S. 809, 814 (1994). CERCLA “[s]ections 104 and 106 provide the framework for federal abatement and enforcement actions that the President, [or] the EPA as his delegated agent ... initiates.” *Id.* (citing 42 U.S.C. §§ 9604, 9606).<sup>1</sup> CERCLA empowers EPA to: (1) perform cleanup actions itself; (2) compel responsible parties through an administrative order to perform cleanup actions under EPA’s supervision; or (3) enter into agreements with potentially responsible parties (“PRPs”) to perform specified cleanup actions. *See* 42 U.S.C. §§ 9604, 9606.

EPA implements CERCLA’s requirements through federal regulations known as the National Contingency Plan (“NCP”), 40 C.F.R. § 300.1. The NCP establishes the regulatory processes EPA follows to compare remedial alternatives and select an appropriate response action. As part of the NCP, the President maintains a list of “national priorities among the known releases or threatened releases throughout the United States.” 42 U.S.C. § 9605(a)(8)(B). This is called

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<sup>1</sup> CERCLA is codified at 42 U.S.C. §§ 9601-9675. In keeping with the practice of most courts, this brief refers “to sections of CERCLA rather than the U.S. Code.” *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 161 n.1 (2004).

the National Priorities List (“NPL”). 40 C.F.R. § 300.425(b). The process for adding a site to the NPL involves participation by the state where the site is located and by the public. *Id.* §§ 300.425(d)(5), 515(c). Sites selected to the NPL are known as “Superfund sites.” *ARCO Envtl. Remediation, LLC v. Dep’t of Health & Envtl. Quality*, 213 F.3d 1108, 1111 n.2 (9th Cir. 2000).

After a site is added to the NPL, EPA is required to conduct a remedial investigation and feasibility study (“RI/FS”). *United States v. Asarco Inc.*, 430 F.3d 972, 976 (9th Cir. 2005). During the RI/FS process, EPA “assess[es] site conditions and evaluate[s] alternatives,” and then selects a remedy that will “eliminate, reduce, or control risks to human health and the environment.” 40 C.F.R. § 300.430(a)(1)-(2).

Following the RI/FS, EPA presents its proposed remedy to the public for review and comment. 40 C.F.R. § 300.430(f)(1)(ii). The public comment period is required to include, at a minimum: (a) notice and a summary analysis of the proposed plan in a major local newspaper of general circulation; (b) availability of the proposed plan in the administrative record; (c) a reasonable opportunity for submission of written and oral comments on the proposed plan; and (d) a public meeting regarding the proposed plan. *Id.* § 300.430(f)(3)(i). EPA is required to prepare a written summary of significant comments, criticisms, and new relevant information submitted during the public comment period, along with its responses

to public comments. *Id.* After the public comment period, EPA selects a final remedy and memorializes it in a public document called a Record of Decision (“ROD”). *Id.* § 300.430(f)(3)-(6).

CERCLA recognizes that at many sites, some hazardous substances will remain even after the remedy is complete.<sup>2</sup> At these sites, EPA is required to review the remedy every five years after the cleanup begins “to assure that human health and the environment are being protected by the remedial action being implemented.” 42 U.S.C. § 9621(c); 40 C.F.R. § 300.430(f)(4)(ii). If additional cleanup is required, EPA will ensure that it is performed, which may include amending the ROD. 40 C.F.R. § 300.435(c)(2).

Although CERCLA “provides for community input throughout the cleanup process,” *New Mexico v. General Electric Co.*, 467 F.3d 1223, 1234 n.19 (10th Cir. 2006), the statute protects EPA’s chosen remedy from interference through unauthorized lawsuits or unapproved cleanup actions. “Congress concluded that the need for such [EPA] action was paramount, and that peripheral disputes, including those over ‘what measures actually are necessary to clean-up the site and remove the hazard,’ may not be brought while the cleanup is in process.” *McClellan Ecological Seepage Situation v. Perry*, 47 F.3d 325, 329 (9th Cir. 1995) (quoting *Boarhead Corp. v. Erickson*, 923 F.2d 1011, 1019 (3d Cir. 1991)).

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<sup>2</sup> This is common where the hazardous substances are minerals that occur naturally in the area, as is the case at the Anaconda Smelter Superfund Site.

“To ensure that the cleanup of contaminated sites will not be slowed or halted by litigation, Congress enacted section 113(h) in its 1986 amendments to CERCLA.” *Razore v. Tulalip Tribes*, 66 F.3d 236, 239 (9th Cir. 1995).

Section 113 limits court challenges to an EPA cleanup to the narrow circumstances enumerated in the statute.

To ensure that EPA’s selected remedy is not obstructed or negated by unauthorized cleanup attempts, Congress also added § 122(e)(6) in the 1986 CERCLA amendments. Section 122(e)(6) prevents cleanup work without EPA approval after a RI/FS has begun, because unapproved work could interfere with EPA’s chosen remedy or exacerbate the contamination. *E.I. DuPont de Nemours & Co. v. United States*, 460 F.3d 515, 539 n.28 (3d Cir. 2006), *vacated on other grounds*, 551 U.S. 1129 (2007).

## **II. The Anaconda Smelter Superfund Site and CERCLA cleanup**

For nearly 100 years, the Anaconda Smelter processed ore from mines in Butte to produce metallic copper. In addition to the desired copper, the Butte ore contained high levels of arsenic and other metals. Remedial investigations of the area show that during the smelting process, some of that arsenic was emitted from the smelter stack and settled on the surrounding land. *See Christian v. Atl. Richfield Co.*, 2015 MT 255, ¶ 1, 380 Mont. 495, 358 P.3d 131.

The Anaconda Smelter closed in 1980, and the smelter and surrounding area were added to the NPL in 1983. *See* Amendment to National Oil & Hazardous Substance Contingency Plan; National Priorities List, 48 Fed. Reg. 40,658 (Sept. 8, 1983). All of the properties that are the subject of Plaintiffs' claims are within the boundaries of the Superfund Site. *Christian*, ¶ 7. Since the early 1980s, Atlantic Richfield has worked with EPA—as well as state and local agencies—to conduct extensive environmental investigations and cleanup work at the Site. During that time, EPA has selected and refined site-specific remedies after years of study and public comment and in accordance with CERCLA's requirements to achieve cleanup standards that are protective of human health and the environment. (APP-0065, ¶ 7.) Atlantic Richfield has spent more than \$400 million implementing EPA's remedies at the Site, including extensive investigations and cleanup work in and around Plaintiffs' community.

EPA issued its first administrative order to Atlantic Richfield in 1984, which required Atlantic Richfield to perform a site-wide RI/FS. Atlantic Richfield completed that RI/FS in 1987. (APP-0065, ¶ 9.) EPA divided the Site into five major sections called Operable Units ("OUs"), each of which relates to a different medium or geographic area for cleanup. Each OU has its own ROD describing the

remedy that EPA selected.<sup>3</sup> (APP-0065-66, ¶ 10.) Two of the OUs—Community Soils (“CS”) and Anaconda Regional Water, Waste, and Soils (“ARWWS”)—relate directly to Plaintiffs’ properties. (APP-0066, ¶ 11.)

Under an administrative order first issued in 1988, EPA required Atlantic Richfield to conduct separate RI/FSs for both CSOU and ARWWS OU. Atlantic Richfield completed them in 1996. EPA subsequently made its remedy-selection decisions in separate RODs for these OUs—in 1996 for CS, and in 1998 for ARWWS. The CSOU ROD addresses residential soils, including Plaintiffs’ residential yards. The ARWWS OU ROD addresses surface water, groundwater, and non-residential soils. Plaintiffs’ domestic wells and pasture properties are subject to the ARWWS OU ROD. (APP-0066, ¶¶ 12-16.)

The CSOU ROD requires testing of residential yards in certain areas of the Site and provides for cleanup of any yards exceeding the EPA-established action levels of 250 parts per million (“ppm”) arsenic (measured on a yard-weighted average basis) or 400 ppm lead. Cleanup for yards exceeding the action levels consists of removing the soil and replacing it with clean soil and sod. Under the CSOU ROD, Atlantic Richfield has sampled approximately 1,740 residential yards, and has remediated over 350 yards—including 25 of Plaintiffs’ yards. All of the work Atlantic Richfield has performed under the CSOU ROD has been

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<sup>3</sup> The State of Montana concurred in the remedies EPA selected for the Site, and the State co-signed the RODs.

ordered, approved, and supervised by EPA. (APP-67-68, ¶¶ 17-22, -0069, ¶ 28, -0984-85.)

Under the ARWWS OU ROD, Atlantic Richfield has implemented remedies in vast areas that formerly were used for ore-processing, smelting and related industrial operations. It also has tested the domestic wells of Opportunity and Crackerville residents, including Plaintiffs. The ROD requires that all domestic wells be tested at least once every five years. If a domestic well tests under 5 parts per billion ("ppb") arsenic, no additional action is taken. If a well tests over 5 ppb but under 10 ppb arsenic (the federal and state drinking water standard), it is monitored annually for three years to make sure it does not exceed 10 ppb. If the well tests over 10 ppb arsenic, it is replaced or a water treatment system is installed and bottled water is provided to the homeowner until water quality is confirmed. Only one well on Plaintiffs' properties tested over 10 ppb arsenic. Atlantic Richfield replaced that well and it now tests below 10 ppb arsenic.<sup>4</sup> All of the work Atlantic Richfield has performed under the ARWWS OU ROD has been ordered, approved, and supervised by EPA. (APP-0068-69, ¶¶ 23-28.)

EPA has reexamined and modified the CSOU and ARWWS OU remedies since they were first implemented, resulting in amendments to both RODs. EPA amended the ARWWS OU ROD in 2011, primarily to incorporate the lowering of

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<sup>4</sup> Another well on a property previously owned by a Plaintiff tested above 10 ppb. That well also was replaced, and the property has since been sold to a non-party.

the federal drinking water standard for arsenic from 18 ppb to 10 ppb. (APP-0068, ¶ 23.) As a result of the five-year review process and accompanying public comments, EPA amended the CSOU ROD in 2013, adding the action level for lead. (APP-0947.)

Cleanup under both the CSOU ROD and the ARWWS OU ROD is ongoing. (APP-0069, ¶ 28.) In September 2015, EPA issued a CSOU Unilateral Administrative Order requiring Atlantic Richfield to conduct additional cleanup work at the Site, including on Plaintiffs' properties. (APP-1172-95.) In 2016, Atlantic Richfield began cleanup of lead in residential soils under the terms of the amended CSOU ROD. Also in 2016, Atlantic Richfield continued cleanup work under the amended ARWWS OU ROD throughout the Site, including on pasture properties. Atlantic Richfield, EPA, and the State and local governments are currently negotiating a final site-wide consent decree that will encompass all remaining remedies and related work to be conducted at the Site. EPA estimates that active remediation of the Site will be completed by 2025. (APP-1050.)

### **III. Plaintiffs' claim for restoration damages and proceedings below**

Plaintiffs allege that Atlantic Richfield and its predecessors damaged their properties while conducting "a milling and smelting operation located near the towns of Anaconda and Opportunity ... from 1884 to 1980." (APP-0023, ¶ 11.)

Plaintiffs seek the following damages: (a) "Injury to and loss of use and

enjoyment of real and personal property;" (b) "Loss of the value of real property;" (c) "Incidental and consequential damages, including relocation expenses and loss of rental income and/or value;" (d) "Annoyance, inconvenience and discomfort over the loss and prospective loss of property value;" and (e) "Expenses for and cost of investigation and restoration of real property." (APP-0033, ¶ 43(A)-(E).)

This Petition concerns only the last category, "restoration" damages.

**A. Restoration damages under Montana law**

In a case involving alleged injury to real property, "[t]he difference between the value of the property before and after the injury, or the diminution in value, generally constitutes the appropriate measure of damages." *Sunburst Sch. Dist. No. 2 v. Texaco, Inc.*, 2007 MT 183, ¶ 30, 338 Mont. 259, 165 P.3d 1079. In certain circumstances, however, a plaintiff may elect to recover restoration costs, rather than diminution in value, as the measure of property damage. *Id.* ¶ 38; *see also Lampi v. Speed*, 2011 MT 231, ¶¶ 22-23, 362 Mont. 122, 261 P.3d 1000; *McEwen v. MCR, LLC*, 2012 MT 319, ¶ 29, 368 Mont. 38, 291 P.3d 1253.

In order to recover restoration damages, the plaintiff must prove that (1) the injury to his property is temporary, i.e., reasonably abatable, and (2) that he has "reasons personal" for requesting such damages. *Lampi*, ¶ 29.

"The personal reasons analysis includes a determination of whether the plaintiff genuinely intends to restore the property." *McEwen*, ¶ 31. In other words,

to recover restoration damages, the plaintiff must present sufficient evidence to convince the fact-finder that he will conduct the property restoration upon which his claim of damages is based. *Lampi*, ¶ 31 (“The reasons personal rule requires plaintiff to establish that the award actually will be used for restoration ....”); *Sunburst*, ¶ 43 (affirming award of restoration damages where “[t]he record in this case indicates that Sunburst actually will use the award of restoration damages to remediate the groundwater contamination”). This requirement “ensure[s] that an injured property owner does not profit from restoration damages,” thereby receiving a “windfall.” *McEwen*, ¶ 50.

**B. Plaintiffs’ restoration remedy**

Plaintiffs’ proposed restoration remedy is described in the reports and disclosures of their retained experts. One of Plaintiffs’ experts, Richard Pleus, entitled his report “Critique of the Final Baseline Human Health Risk Assessment for the Anaconda Smelter NPL Site, Anaconda, Montana (CDM 1996) and Reassessment of Soil Screening Levels for the Opportunity Community.” (APP-0567-666.) As the title indicates, Dr. Pleus criticizes EPA’s risk assessment and chosen action level for soils cleanup at the Site. Dr. Pleus opines that “[m]y review of the U.S. EPA Superfund ROD for the Anaconda Company Smelter ... [and risk assessment] has found that [EPA’s] arsenic risk estimate and residential action level of 250 ppm is not appropriate.” (APP-0571.) Dr. Pleus then conducts

his own risk assessment and suggests that the soils action level should be 8 ppm. (APP-0571, -0613-14, -0627-28.) Dr. Pleus thus directly challenges EPA's remedial decision concerning the arsenic action level for residential soils.

Another of Plaintiffs' experts, William Meggs, also challenges EPA's action levels for residential soils at the Site. Dr. Meggs opines that the "plan to remove only that soil which exceeds 250 parts per million arsenic and 400 parts per million lead does not sufficiently limit the risks posed to residents of Opportunity. Those levels are in excess of known human health standards." (APP-0895.)

Plaintiffs' expert John Kane opines that an alternative restoration of Plaintiffs' properties is necessary beyond EPA's chosen remedies. (See APP-0706-892.) Mr. Kane's soils remedy consists of removing the entire top two feet of soil from every one of Plaintiffs' properties—574,000 tons of soil in all—regardless of whether the soil contains elevated levels of contaminants, and transporting that soil to waste repositories in either Anaconda, Missoula, or Spokane, Washington. (APP-0715-16, -0905.) Mr. Kane then proposes to replace this soil with clean fill and to re-sod the yards. (APP-0715.)

Although it is undisputed that all Plaintiffs have clean drinking water and do not use or even come into contact with the shallow groundwater beneath their properties, Mr. Kane also proposes an expansive shallow groundwater remedy consisting of three "underground Passive Reactive Barrier (PRB) wall[s]"

upgradient of Plaintiffs' properties. These walls will be 15 feet deep, 3 feet wide, and total 19,000 feet in length. (APP-0716, -0905.)

Mr. Kane's cost estimate for Plaintiffs' proposed restoration remedy has fluctuated between \$38 million and \$101 million. His latest estimates range from \$50 million to \$57.6 million. (APP-0905-06.)

### **C. Proceedings in the district court**

In 2013, Atlantic Richfield moved for summary judgment on the ground that Plaintiffs' claim for restoration damages is barred by CERCLA. The district court, however, did not rule on the motion at that time. Instead, the district court (Newman, J.) dismissed the case as barred by the statutes of limitations. Plaintiffs appealed, and on September 1, 2015, this Court affirmed in part, reversed in part, and remanded the case for further proceedings. *Christian*, ¶ 1. The Court specifically noted that other summary judgment motions were pending—including the motion based on CERCLA that is the subject of this Petition—and that the district court should rule on them in the first instance. *Id.* ¶¶ 10, 45.

On remand, the case was reassigned to Judge Katherine M. Bidegaray. The district court set a hearing date for the pending motions for summary judgment. A month before the argument date, and well in advance of the deadline for supplemental briefing on the motions, the United States filed a request for leave to submit an *amicus curiae* brief in support of Atlantic Richfield's CERCLA motion.

(APP-0522-57.) Plaintiffs opposed the United States' motion, and it was fully briefed. The United States also filed a request to participate in the oral argument on the CERCLA motions. (APP-1196-99.) The district court never ruled on either the United States' motion to submit an *amicus* brief or its request to participate in the argument.

After a hearing on five motions for summary judgment, including the cross-motions on CERCLA, the district court ordered the parties to submit proposed orders on all pending motions—including 12 summary judgment motions. The district court then issued multiple orders, denying all of Atlantic Richfield's contested motions for summary judgment and granting all of Plaintiffs' motions for summary judgment. In each instance, the district court signed Plaintiffs' proposed orders verbatim—a practice this Court “disapprove[s], heartily and stoutly.” *State v. Lacey*, 2009 MT 62, ¶ 63, 349 Mont. 371, 204 P.3d 1192. This included the order that is the subject of this Petition, entitled “Order Denying ARCO's Motion for Summary Judgment on Plaintiffs' Claim for Restoration Damages as Barred by CERCLA and Granting Plaintiffs' Motion for Summary Judgment on ARCO's CERCLA Preemption Affirmative Defenses (11<sup>th</sup>-13<sup>th</sup>)” (the “Order”). (APP-0001-17.)

Atlantic Richfield filed a Petition for Writ of Supervisory Control, requesting that this Court vacate four of the district court's orders on summary

judgment and one of its orders on a motion *in limine*. This Court agreed to “take jurisdiction of the case on supervisory control for the limited purpose of considering the district court’s [CERCLA] Order,” and ordered full briefing on this issue.

### **STANDARD OF REVIEW**

This Court “will assume supervisory control over a district court to direct the course of litigation if the court is proceeding based on a mistake of law, which if uncorrected, would cause significant injustice for which appeal is an inadequate remedy.” *Stokes v. Mont. Thirteenth Jud. Dist. Ct.*, 2011 MT 182, ¶ 5, 361 Mont. 279, 259 P.3d 754.

Both summary judgment rulings and issues of law, such as the application of federal statutes, are reviewed *de novo*. *Mont. Immigrant Justice All., MEA-MFT v. Bullock*, 2016 MT 104, ¶ 14, 383 Mont. 318, 371 P.3d 430; *Tidyman’s Mgmt. Servs. Inc. v. Davis*, 2014 MT 205, ¶ 13, 376 Mont. 80, 330 P.3d 1139.

### **SUMMARY OF THE ARGUMENT**

CERCLA bars Plaintiffs’ claim for restoration damages in three separate ways. First, § 113 requires that any challenges to EPA’s selected remedy at a Superfund site be brought in federal court in the manner and timing prescribed by Congress. Plaintiffs’ restoration claim constitutes a direct challenge to EPA’s cleanup orders and Plaintiffs concede that they cannot bring a challenge under

CERCLA until the cleanup is completed. Therefore, the district court lacks jurisdiction over Plaintiffs' claim for restoration damages. Second, § 122(e)(6) prohibits unauthorized cleanup work at a Superfund site. EPA has expressly rejected Plaintiffs' proposed restoration remedy. Because CERCLA prohibits Plaintiffs from performing their restoration remedy, they cannot establish a prerequisite to an award of restoration damages as a matter of Montana law. Third, even if Plaintiffs' restoration claim were not barred by § 113 or § 122(e)(6), it is nonetheless preempted by CERCLA because it conflicts with Congress's clear and overarching intent to vest EPA with exclusive authority to determine the remedy at Superfund sites, to prevent conflicting remedies, and to protect EPA's remedy from interference while it is being implemented.

The district court erred by not granting summary judgment in favor of Atlantic Richfield on this claim, and this Court should reverse.

### ARGUMENT

#### **I. CERCLA § 113 bars Plaintiffs' restoration damages claim.**

CERCLA § 113 allows only certain kinds of challenges to EPA's selected remedy for a federally-regulated Superfund site, and requires that any permissible challenge be brought in federal court. Plaintiffs' claim for restoration damages constitutes an impermissible "challenge" under § 113, and is therefore barred.

**A. Federal courts have exclusive jurisdiction over all “challenges” to EPA’s remedy.**

“With limited exceptions, § 113(b) confers on the federal district courts ‘exclusive original jurisdiction over all controversies arising under [CERCLA].’”  
*ARCO Envtl. Remediation*, 213 F.3d at 1115 (quoting 42 U.S.C. § 9613(b)).

Section 113(h) then retracts much of that jurisdictional grant:

*No Federal court shall have jurisdiction under Federal law ... or under State law ... to review any challenges to removal or remedial action selected under section 9604 of this title, or to review any order issued under section 9606(a) of this title, in any action except one of the following:*

- (1) An action ... to recover response costs or [natural resource] damages or for contribution.
- (2) An action to enforce an order issued under section 9606(a) of this title ....
- (3) An action for reimbursement [of EPA costs] ....
- (4) An action under section 9659 of this title (relating to citizens suits) .... Such an action may not be brought with regard to a removal where a remedial action is to be undertaken at the site.
- (5) An action ... in which the United States has moved to compel a remedial action.

42 U.S.C. § 9613(h) (emphasis added). Section 113(h) is “clear and unequivocal,” and “amounts to a blunt withdrawal” of federal jurisdiction over any “challenges” to a CERCLA cleanup that fall outside the five narrow exceptions. *McClellan*, 47 F.3d at 328; *Oil, Chem. & Atomic Workers Int’l Union, AFL-CIO v. Richardson*,

214 F.3d 1379, 1382 (D.C. Cir. 2000) (“Although § 113(h) is subject to limited exceptions ... it otherwise effectuates a ‘blunt withdrawal of federal jurisdiction ....’” (quoting *N. Shore Gas Co v. EPA*, 930 F.2d 1239, 1244 (7th Cir. 1991))).

The Ninth Circuit has read §§ 113(b) and (h) together to “deprive the Montana state court[s] of jurisdiction” over any claim that “constitute[s] ‘a challenge to a CERCLA cleanup.’” *ARCO Envtl. Remediation*, 213 F.3d at 1115; *see also Fort Ord Toxics Project, Inc. v. Cal. EPA*, 189 F.3d 828, 832 (9th Cir. 1999) (§ 113 bars “challenges” brought in state courts).

Plaintiffs do not contend that their restoration claim fits within any of the § 113(h) exceptions. (APP-0008 n.1.) The question, then, turns on whether Plaintiffs’ claim for restoration damages “challenges” the CERCLA cleanup. If so, the district court lacks jurisdiction over that claim and it must be dismissed.

**B. Plaintiffs’ claim for restoration damages “challenges” EPA’s remedy for their properties.**

“An action constitutes a challenge to a CERCLA cleanup ‘if it is related to the goals of the cleanup.’” *ARCO Envtl. Remediation*, 213 F.3d at 1115 (quoting *Razore*, 66 F.3d at 239). “Challenges” include, among other things, any action in which a party seeks “to dictate specific remedial actions; to postpone the cleanup; to impose additional reporting requirements on the cleanup; or to ... alter the method and order of cleanup.” *Id.* (citations omitted). Likewise, a claim

“challenges” a cleanup if it “interfere[s] with the remedial actions selected [by EPA],” or “seeks to improve on the CERCLA cleanup.” *McClellan*, 47 F.3d at 330; *see also Pakootas v. Teck Cominco Metals, Ltd.*, 646 F.3d 1214, 1222 (9th Cir. 2011).

Plaintiffs’ restoration claim easily satisfies these criteria for a “challenge” to a CERCLA cleanup. Plaintiffs seek to impose their own subjective cleanup standards and to employ cleanup methods different than those selected by EPA for the Site. Plaintiffs’ expert toxicologist, Dr. Pleus, criticizes EPA’s human health risk assessment for the Site (APP-0571), and rejects the 250-ppm arsenic action level selected by EPA in the CSOU ROD for residential soil remediation. (*See* APP-0691-92 (“I conclude that ... the 250 ppm action level ... is not appropriately health protective.”).) Plaintiffs’ other toxicologist, Dr. Meggs, similarly rejects EPA’s soil action levels as exceeding “known human health standards.” (*See* APP-0895.) The purpose of these experts’ opinions is to support Plaintiffs’ claim that the ongoing, EPA-ordered cleanup is insufficient, and that a more extensive cleanup is necessary.

Plaintiffs’ remediation expert, John Kane, provides the more extensive cleanup plan that Plaintiffs intend to perform. Mr. Kane calculates his own “background concentrations of arsenic and other heavy metals” for the Site—which he concedes are “contrary to the findings ... of the [EPA] ARWW&S OU

Final Site Characterization Report”—and proposes his own alternative soils and groundwater remedies that conflict with those selected by EPA. (APP-0708-11.)

Plaintiffs’ restoration remedy directly contradicts the remedies EPA has selected for the Site. EPA considered and rejected remedies similar to those proposed by Mr. Kane in the course of its regulatory deliberations. In determining the remedy for surface and groundwater, EPA considered a subterranean wall upgradient of Plaintiffs’ community, similar to that proposed by Mr. Kane. (APP-0070, ¶ 33.) But EPA determined such a remedy was unnecessary and impractical because contamination in the shallow groundwater does not affect domestic use and there was no evidence of contamination migrating toward the town. (*Id.*) Instead, EPA ordered Atlantic Richfield to implement other measures, including the domestic well program described above, source control throughout the Site, and a long-term groundwater monitoring program.<sup>5</sup> (APP-0099-103.)

Likewise, in determining the arsenic action levels for the Site, EPA considered lower action levels—which would have required more extensive soil removal and yard replacements—but rejected them as unnecessary to protect human health and the environment. (APP-0070, ¶ 32.) And EPA’s soil removal remedy for Plaintiffs’ communities requires disposal of contaminated soil in a

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<sup>5</sup> If the groundwater monitoring program shows that conditions have changed, there is a contingency plan in place for EPA to require additional remedial measures. (APP- 0913.)

designated waste repository in Deer Lodge Valley, not in Missoula or Spokane, as proposed by Mr. Kane. (APP- 0538.)

Furthermore, Plaintiffs' restoration actions would likely exacerbate conditions at the Site. Plaintiffs' proposed soils remedy would tear up hundreds of acres that currently have established vegetative cover, thus increasing the risk of exposure to any contaminants below the surface. For similar reasons, EPA rejected a much less radical remedy for Plaintiffs' pasture properties that Atlantic Richfield previously proposed. The effect of Plaintiffs' proposed PRB walls is even more uncertain. Construction of such massive structures, including necessary dewatering, could cause contaminated water to migrate in unforeseen ways. And, once constructed, such underground walls could divert the flow of groundwater in several areas of concern, which would negate the ongoing groundwater monitoring program under EPA's cleanup plan.

Plaintiffs' restoration claim constitutes a prohibited "challenge" under § 113(h) for at least three reasons:

First, Plaintiffs' proposed restoration plan unquestionably "is related to the goals of the cleanup," *Razore*, 66 F.3d at 239, and seeks "to improve on the CERCLA cleanup," *McClellan*, 47 F.3d at 330. As the Court recognized in its previous decision in this case, Plaintiffs "clearly believe that the EPA-approved residential action level is inappropriate." *Christian*, ¶ 76. But "where the EPA

works out a plan, and a ... suit 'seeks to improve on the CERCLA cleanup' because it 'wants more,'" it is prohibited by § 113(h). *Pakootas*, 646 F.3d at 1220 (quoting *McClellan*, 47 F.3d at 330).

Second, Plaintiffs' restoration plan would "interfere with the remedial actions selected under CERCLA." *McClellan*, 47 F.3d at 330. "EPA has determined that these restoration damages conflict with the EPA remedy." (APP-0562.) Plaintiffs' soil remedy—removal of the top two feet of every Plaintiff's property—would undo all of the soils cleanup work already completed on Plaintiffs' properties under EPA's remedy, including the clean fill and re-vegetation efforts. And it would destroy vegetative cover on pasture properties that EPA has decided are better left undisturbed. According to the United States, Plaintiffs' "underground barriers could divert groundwater in several areas of concern, which are subject to ongoing groundwater monitoring efforts under EPA's selected cleanup plan." (APP-0554.) Plaintiffs' restoration plan would not simply add to the EPA remedy—"aspects of their plan are squarely contrary to EPA's remedies or could make those remedies difficult or impossible to achieve." (*Id.*)

Third, only the President—and EPA as the delegated agent—has the authority to select a remedy at a federal Superfund site and to require a responsible party to pay for it. *Key Tronic Corp.*, 511 U.S. at 814; 42 U.S.C. §§ 9604, 9617.

Allowing private plaintiffs to force a responsible party to finance an alternative environmental remedy usurps the prerogative of EPA and could interfere with the responsible party's ability to finance and perform EPA's selected remedy. As recognized by the Ninth Circuit in a similar context, such a suit "always has the potential to interfere with ongoing cleanup efforts, because of its potential effect on the responsible party's financial ability to perform the cleanup." *Pakootas*, 646 F.3d at 1222.<sup>6</sup> A responsible party facing such a lawsuit "may simply go bankrupt and leave" rather than defend the lawsuit and continue performing the remedy EPA selected. *Id.*

It is difficult to imagine a clearer example of a claim that "challenges" EPA's chosen remedy at a Superfund site. For all of these reasons, Plaintiffs' claim for restoration damages is barred by CERCLA § 113 and must be dismissed.

**C. Plaintiffs provide no basis for circumventing § 113's prohibition on challenges to EPA's selected remedy.**

Plaintiffs have asserted several arguments to avoid CERCLA's application to their restoration claim, which were incorporated into the district court's Order. First, Plaintiffs contend that CERCLA's "savings clauses" specifically provide for their state-law restoration claim. But the statute plainly states that its savings clauses do not affect the application of § 113, and courts have rejected the

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<sup>6</sup> This principle holds even where the particular defendant has the financial ability to simultaneously pay a judgment in the private lawsuit and finance EPA's cleanup, because "that cannot be assumed for this or for all cases." *Id.*

argument Plaintiffs advance here. Second, Plaintiffs rely on isolated passages from CERCLA's conflicting legislative history to argue that § 113 applies only to challenges brought by "polluters" and that it does not bar state-law causes of action. Section 113, however, is not so limited, and fundamental rules of statutory construction preclude legislative history from altering a statute's unambiguous language.

**1. CERCLA's savings clauses do not allow Plaintiffs' restoration claim.**

Plaintiffs rely on three "savings clauses"—CERCLA §§ 114, 107(j), and 302(d)—to argue that § 113 cannot be applied to their claim for restoration damages. (APP-0227-28.) Plaintiffs, however, ignore the specific savings clause in CERCLA that directly addresses whether § 113 can preclude common-law remedies. Section 310(h) provides:

[CERCLA] does not affect or otherwise impair the rights of any person under Federal, State, or common law, *except with respect to the timing of review as provided in section [113(h)] of this title ....*

42 U.S.C. § 9659(h) (emphasis added). The express language of § 310(h) demonstrates that CERCLA's general savings provisions do not restrict the operation of § 113 even where a state-law challenge is asserted. *See Anacostia Riverkeeper v. Wash. Gas Light Co.*, 892 F. Supp. 2d 161, 171 (D.D.C. 2012) (Section 310(h) "makes the primacy of CERCLA § 113(h) explicit."). This is consistent with the well-established rule of statutory construction that a more

specific provision in a statute will control a more general provision. *See, e.g., Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992); accord § 1-2-102, M.C.A.

Plaintiffs rely primarily on § 302(d), which says “[n]othing in this chapter shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law ....” 42 U.S.C. § 9652(d). But courts, including the Ninth Circuit, have determined that § 302(d) does not restrict the application of § 113. *Razore*, 66 F.3d at 240 (“[I]f section 302(d) were to govern the interpretation of the statute, it would effectively write section 113(h) out of the Act.” (alterations and quotations omitted)). Moreover, applying § 302(d) in the manner advocated by Plaintiffs would render § 113(h)’s prohibition on challenges asserted “under State law” superfluous. *See, e.g., Bennett v. Spear*, 520 U.S. 154, 173 (1997) (“It is the cardinal principle of statutory construction ... to give effect, if possible, to every clause and word of a statute rather than to emasculate an entire section.” (alterations and quotations omitted)); accord *State v. Berger*, 259 Mont. 364, 367, 856 P.2d 552, 554 (1993). This Court also should reject Plaintiffs’ argument, both with respect to § 302(d) and the other provisions cited by Plaintiffs—§§ 114 and 107(j).<sup>7</sup>

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<sup>7</sup> These other provisions have no relevance to Plaintiffs’ restoration claim. Section 114(a) preserves the rights of states to enact “state environmental regulations which in some instances set more stringent cleanup standards” than those provided

**2. Plaintiffs' reliance on CERCLA's legislative history is misplaced.**

Plaintiffs contend that various snippets of CERCLA's legislative history (1) limit the application of § 113(h) to challenges asserted by "polluters" and (2) exclude any challenges relating to state-law property damage claims. (APP-0232-38; *see also* APP-0012-14.) These arguments are foreclosed by the plain language of the statute and the overwhelming weight of authority.

**a. Section 113 is not limited to actions brought by "polluters."**

Plaintiffs first argue that CERCLA's legislative history indicates that § 113(h) applies only to challenges asserted by "polluters" to delay the cleanup. (APP-0232-34.) Neither the statutory language nor the legislative history supports this argument.

In *McClellan*, the Ninth Circuit rejected the argument that § 113(h) applies only to "polluters." *See* 47 F.3d at 328-29. As here, the plaintiffs in *McClellan* cited the statute's legislative history to limit the application of § 113(h) to "challenges brought by potentially responsible parties." *Id.* at 328. The court disagreed, finding that "[t]his argument is contradicted by the plain words of the

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by CERCLA. *Gen. Elec. Co.*, 467 F.3d at 1246. Section 114(b), CERCLA's double-recovery provision, prohibits recovering "the same removal costs or damages or claims" under both CERCLA and other federal or state law. 42 U.S.C. § 9614(b). Section 107(j) exempts a "federally permitted release" from CERCLA liability, but preserves liability under other federal or state law for hazardous waste discharges under a federal permit. 42 U.S.C. § 9607(j).

statute.” *Id.* As the court explained, “[t]he prohibitory language of Section 113(h) does not distinguish between plaintiffs.” *Id.* Further, the court specifically rejected the invocation of legislative history to limit the scope of § 113(h) because “the statutory language is so clear,” but “the legislative history of Section 113(h) is, at best, unclear.” *Id.* at 328 n.4 (citation omitted).

Just as in *McClellan*, Plaintiffs’ reliance on legislative history to contradict the plain language of the statute is inappropriate. *Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994) (“[W]e do not resort to legislative history to cloud a statutory text that is clear.”); accord *Haney v. Mahoney*, 2001 MT 201, ¶ 7, 306 Mont. 288, 32 P.3d 1254.

Section 113(h) applies to “any challenges to [CERCLA] removal or remedial action[s]” no matter who asserts the challenge. 42 U.S.C. § 9613(h) (emphasis added). Plaintiffs do not contend that this language is ambiguous, nor could they—the statute’s language is “clear and unequivocal.” *McClellan*, 47 F.3d at 328. The legislative history is therefore irrelevant.<sup>8</sup>

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<sup>8</sup> If § 113 only barred challenges by polluters, there would be no need for the statutory exception for citizen suits, 42 U.S.C. § 9613(h)(4). Moreover, courts routinely apply § 113(h) to bar claims by individuals and citizen groups who are dissatisfied with EPA’s selected remedy. See, e.g., *Pakootas*, 646 F.3d at 1220; *Frey v. EPA*, 270 F.3d 1129, 1133-34 (7th Cir. 2001); *Anacostia Riverkeeper*, 892 F. Supp. 2d at 165.

- b. Section 113 bars state-law claims that challenge a CERCLA remedy.

The legislative history similarly does not preserve all state-law challenges to a remedy, as Plaintiffs assert. Plaintiffs cherry-pick various comments from CERCLA's legislative history indicating that § 113(h) would not preclude property owners from asserting state-law nuisance claims. (APP-0233, -0236; *see also* APP-0012-14.) But Atlantic Richfield does not argue that CERCLA bars all state-law property damage claims—or even that it bars Plaintiffs' nuisance claims in this case. Section 113 does, however, bar unauthorized challenges to EPA's selected remedy for a Superfund site, regardless of whether such challenges are premised on state law. *Fort Ord*, 189 F.3d at 832 (§ 113 bars state-law challenges); *see also ARCO Envtl. Remediation*, 213 F.3d at 1115. Plaintiffs' restoration claim is a prohibited state-law challenge.

Even the legislative history cited by Plaintiffs acknowledges that state-law claims are permissible only to the extent they do not conflict with CERCLA. For example, 132 Cong. Rec. 29,737 (1986) says that “[s]ection 113(h) does not affect the ability to bring nuisance actions under State law for remedies within the control of the State courts *which do not conflict with the Superfund legislation.*” (APP-0234 (emphasis added).) The same passage of legislative history elaborates that 113(h) “preserv[es] State nuisance actions *in a limited manner,*” and allows private

citizens to sue to abate nuisances only “when such actions do not conflict with CERCLA.” (*Id.* (emphasis added).)

Plaintiffs’ cases do not support their position that state-law claims are categorically excluded from § 113(h)’s jurisdictional bar. (*See* APP-0234-37.) For example, *Samples v. Conoco, Inc.*—the primary authority cited by Plaintiffs and the district court—held that § 113(h) “does not affect the rights of persons to bring nuisance, trespass, or similar actions under state law for remedies within the control of state courts *which do not conflict with CERCLA.*” 165 F. Supp. 2d 1303, 1315 (N.D. Fla. 2001) (emphasis added). The court recognized that “[a]n obvious example of a nuisance action that conflicts with CERCLA .... would be one that in essence constitutes a challenge to a removal or remedial action as that term is used in section 113(h).” *Id.* at 1315 n.9. That case is entirely consistent with Atlantic Richfield’s position: Plaintiffs may pursue damages under state law that do not challenge the CERCLA cleanup (such as lost use or diminution in property value), but Plaintiffs’ restoration claim is an “obvious example” of a state-law claim that conflicts with CERCLA because it directly challenges EPA’s remedial decisions for the Site.

## **II. CERCLA § 122(e)(6) bars Plaintiffs’ restoration damages claim.**

After EPA initiates a RI/FS, CERCLA § 122(e)(6) categorically prohibits property owners within a Superfund site from conducting unauthorized remedial

action. EPA has initiated a RI/FS at the Site, and will not authorize Plaintiffs' proposed restoration plan. Because Plaintiffs cannot perform their proposed cleanup, they cannot prove the required elements of a restoration damages claim under Montana law.

**A. Plaintiffs cannot perform their proposed restoration plan because it is not authorized by EPA.**

To ensure that no private party undermines EPA's remedy, § 122(e)(6) requires a "potentially responsible party," or "PRP," to obtain EPA's authorization before performing any remedial action:

When either the President, or a potentially responsible party pursuant to an administrative order or consent decree under this chapter, has initiated a remedial investigation and feasibility study for a particular facility under this chapter, no potentially responsible party may undertake any remedial action at the facility unless such remedial action has been authorized by the President.

42 U.S.C. § 9622(e)(6); *see also* § 9604(a) (permitting PRPs to conduct remedial action only "in accordance with section 9622"). The purpose of § 122(e)(6) is "to avoid situations in which a PRP begins work at a site that prejudices or may be inconsistent with what the final remedy should be or exacerbates the problem." *E.I. DuPont de Nemours & Co.*, 460 F.3d at 539 n.28 (quoting 132 Cong. Rec. S14919 (daily ed. Oct. 3, 1986)). If a PRP does not obtain EPA authorization, the PRP's remedial action is barred by CERCLA—no further analysis of a PRP's proposed remedy is necessary. *See id.* ("[U]nder CERCLA §122(e)(6) ...

Congress expressly forbade, without the EPA's approval, remedial actions by PRPs once an administrative order or consent decree was in place.”).

**1. All of the requirements of § 122(e)(6) are satisfied.**

By its plain terms, § 122(e)(6) prohibits Plaintiffs' claim for restoration damages.

First, EPA long ago initiated a RI/FS at the Site. As discussed above, Atlantic Richfield has completed multiple RI/FSs at the Site pursuant to administrative orders, including the RI/FSs for CSOU and ARWWS OU that encompass Plaintiffs' properties that are the subject of their restoration claim.

Second, the Anaconda Smelter Superfund Site is a “facility,” within the meaning of CERCLA. A facility is defined as “any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located.” 42 U.S.C. § 9601(9)(B). “[T]he term ‘facility’ has been broadly construed by the courts, such that in order to show that an area is a ‘facility,’ the plaintiff need only show that a hazardous substance under CERCLA is placed there or has otherwise come to be located there.” *3550 Stevens Creek Assocs. v. Barclays Bank*, 915 F.2d 1355, 1360 n.10 (9th Cir. 1990). Plaintiffs' own allegations confirm that the Site—and their properties specifically—fit the CERCLA definition of a facility. (See APP-0024, ¶ 12.)

Third, Plaintiffs' proposed restoration plan qualifies as a "remedial action" under CERCLA. Remedial actions are defined as a "permanent remedy" to respond to "the release or threatened release of hazardous substances." 42 U.S.C. § 9601(24). This includes, among other things, "cleanup of released hazardous substances and associated contaminated materials," "excavations," and "perimeter protection using dikes, trenches, or ditches." *Id.* There can be no doubt that Plaintiffs' proposed soils and groundwater remedies fit within this definition.

Fourth, Plaintiffs' proposed remedial action has not been authorized by EPA. In fact, the remedies Plaintiffs propose were affirmatively rejected by EPA during its remedy-selection process. (APP-0070, ¶¶ 31-33.) And the United States' filing in this case leaves no room for doubt on this point: "EPA has determined that the restoration sought by [Plaintiffs] is inconsistent with the CERCLA remedy and EPA would not authorize it under 122(e)(6)." (APP-0556.) Because "EPA has not authorized the remedial action [Plaintiffs] appear to seek in their restoration damages claim," under § 122(e)(6) no "landowner PRP may undertake it." (APP-0555.)

Plaintiffs did not dispute any of these points below, and the district court did not mention them in its Order. Plaintiffs disputed only that they are PRPs.

## 2. Plaintiffs are CERCLA PRPs.

Plaintiffs contended below, without authority, that “as private landowners, [they] are not the type of PRPs contemplated by CERCLA.” (APP-0239.) The district court adopted this argument. (APP-0014.) Plaintiffs, however, misapprehend what it means to be a “potentially responsible party” or “PRP” under CERCLA.

“CERCLA imposes strict liability for environmental contamination upon four broad classes of PRPs ....” *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 608 (2009); 42 U.S.C. § 9607(a)(1)-(4). One class consists of all current owners of property at a CERCLA facility. 42 U.S.C. § 9607(a)(1); *see also Cal. Dep’t of Toxic Substances Control v. Hearthside Residential Corp.*, 613 F.3d 910, 912-13 (9th Cir. 2010) (This section “refer[s] to ‘current’ owners.”); *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1044 (2d Cir. 1985) (“[S]ection 9607(a)(1) unequivocally imposes strict liability on the current owner of a facility ... without regard to causation.”). There is no “private landowner” exception to the statutory definition of PRP, nor does it matter whether Plaintiffs have been “declared PRPs” prior to this case. *Voggenthaler v. Md. Square LLC*, 724 F.3d 1050, 1061 (9th Cir. 2013) (“CERCLA is a strict liability statute in that it does not require a party to act culpably in order to be liable for clean up.”); *Chubb Custom Ins. Co. v. Space Sys./Loral, Inc.*, 710 F.3d 946, 956-57 (9th Cir. 2013) (“The

statute imposes strict liability on four categories of potentially responsible parties (PRPs), for the cleanup costs of an environmental hazard, even if the person did not contribute to the contamination.”).

By their own admission, Plaintiffs are current property owners, and their properties are located within the Site. (APP-0020, ¶ 1.) Thus, regardless of what restoration activities Plaintiffs plan to conduct, or whether they have introduced contaminants onto their properties, Plaintiffs are PRPs under § 107(a)(1). This does not mean they are responsible for the cost of cleaning up the Site—only that they fit the broad, no-fault definition of a “*potentially* responsible party” under CERCLA.

Plaintiffs also asserted below—without evidence—that they are exempt from the definition of PRPs pursuant to the “innocent landowner” and “contiguous landowner” defenses to CERCLA liability. (APP-0239.) Plaintiffs did not include this argument in the proposed order they submitted to the district court—and with good reason. Even if Plaintiffs qualified for these defenses, it would not change their status as “potentially responsible part[ies]” under § 107(a)(1). They still would fit the statutory definition and still would be subject to § 122(e)(6).

Regardless, the innocent landowner defense requires a property owner to establish, *inter alia*, that he or she purchased the property (1) after disposal of contaminants, (2) without actual or constructive knowledge “that any hazardous

substance ... was disposed of on, in, or at the facility,” and (3) after making an appropriate inquiry into the previous ownership and use of the property. 42 U.S.C. § 9601(35)(A)-(B). The contiguous landowner exemption has similar knowledge and inquiry requirements. *Id.* § 9607(q)(1)(A)(viii). Plaintiffs bear the burden of establishing that they qualify for these narrowly applied defenses. *See PCS Nitrogen Inc. v. Ashley II of Charleston LLC*, 714 F.3d 161, 185 (4th Cir. 2013) (“‘Innocent’ current owners and operators seeking to avoid CERCLA’s strict liability scheme must meet the requirements necessary to claim the narrow defenses and exemptions specifically established by Congress.”); *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 883 (9th Cir. 2001) (“Congress intended the [‘innocent landowner’] defense to be very narrowly applicable, for fear that it might be subject to abuse.”). Plaintiffs did not meet their burden in the district court, failing to provide any evidence to establish the requirements of either defense.<sup>9</sup>

Because Plaintiffs are current owners of properties within the Site, the district court erred in concluding that Plaintiffs are not PRPs under CERCLA.

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<sup>9</sup> Moreover, Atlantic Richfield’s evidence confirmed these defenses do not apply. The undisputed facts established that Plaintiffs either purchased their properties while the smelter was operating or with actual or constructive knowledge of the contamination. (APP-0310-11.) *See also Christian*, ¶¶ 66-71 (Plaintiffs’ actual or constructive knowledge precludes application of the discovery rule).

**B. Plaintiffs cannot avoid § 122(e)(6)'s approval requirement.**

Plaintiffs' remaining arguments do not exempt them from § 122(e)(6).

Plaintiffs contend that their "restoration claims are consistent with the EPA remedy and would not exacerbate the pollution issue in Opportunity and Crackerville."

(APP-0481; *see also* APP-0015.) But § 122(e)(6) asks only whether EPA has authorized a PRP's remedy—not whether an unapproved remedy is consistent with EPA's remedy. Section 122(e)(6) requires EPA approval to *ensure* that private party cleanup work does not interfere with EPA's remedy or exacerbate the contamination. *See E.I. DuPont de Nemours & Co.*, 460 F.3d at 539 n.28.

Because EPA has not and will not authorize Plaintiffs' restoration plan, it is prohibited. Regardless, Plaintiffs' restoration remedy *would* conflict with EPA's remedy, as confirmed by the United States. (*See* APP-0553-54.)

Because § 122(e)(6) legally prohibits Plaintiffs from performing their restoration remedy, Plaintiffs can prove no set of facts establishing that they will use a restoration damages award to perform their restoration remedy—a failure of proof on an essential element of their restoration claim. *See McEwen*, ¶ 31; *Stipe v. First Interstate Bank-Polson*, 2008 MT 239, ¶ 14, 344 Mont. 435, 188 P.3d 1063 ("[A] claim fails as a matter of law if the plaintiff fails to establish the material elements of the claim, including damages.").

### III. CERCLA preempts Plaintiffs' restoration damages claim.

The district court erroneously held that CERCLA does not preempt state-law claims. (Order at 4-8.) Although the Court need not reach this issue because §§ 113 and 122(e)(6) bar Plaintiffs' restoration claim,<sup>10</sup> it is independently barred under ordinary preemption principles.

Federal law can preempt state law in three ways: express preemption, field preemption, and conflict preemption. *Arizona v. United States*, 132 S. Ct. 2492, 2500-01 (2012); *Vitullo v. Int'l Bhd. of Elec. Workers, Local 206*, 2003 MT 219, ¶ 14, 317 Mont. 142, 75 P.3d 1250. Under conflict preemption, "state laws are preempted when they conflict with federal law," such that "compliance with both federal and state regulations is a physical impossibility," or where the state-law claim "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Arizona*, 132 S. Ct. at 2501. Plaintiffs' claim for restoration damages is barred by both types of conflict preemption.

As described above, Plaintiffs' restoration claim impermissibly challenges EPA's remedy, and Plaintiffs' restoration plan has not been approved by EPA. Therefore, it is impossible for Plaintiffs' restoration claim to proceed and still comply with federal law, specifically, §§ 113 and 122(e)(6) of CERCLA. *See*

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<sup>10</sup> Courts have applied § 113 for decades—including to state-law claims—without mentioning preemption, *see, e.g., Fort Ord*, 189 F.3d at 832, or have analyzed preemption as a separate concept entirely, *see, e.g., ARCO Envtl. Remediation*, 213 F.3d at 1114-15; *Gen. Elec. Co.*, 467 F.3d at 1247-49.

*AT & T Co. v. Cent. Office Tel., Inc.*, 524 U.S. 214, 227 (1998) (state-law claims barred by conflict preemption because they “directly conflict” with federal law).

Moreover, Plaintiffs’ claim for restoration damages thwarts Congress’s purposes and objectives as expressed in CERCLA for at least three reasons.

First, CERCLA grants EPA, as the agent of the President, sole authority to select environmental remedies at Superfund sites. *Key Tronic Corp.*, 511 U.S. at 814; 42 U.S.C. §§ 9604, 9617. CERCLA and its implementing regulations establish a rigorous regulatory process by which EPA—and EPA alone—selects the remedy, implements it, and evaluates it to ensure it remains effective. *See ARCO Envtl. Remediation*, 213 F.3d at 1111 (“CERCLA requires *the EPA* to determine, for each Superfund site, what is to be cleaned up, the extent of the cleanup, the costs of the cleanup, and how to apportion those costs.” (emphasis added)). Here, Plaintiffs attempt to usurp EPA’s statutory authority to select and implement the appropriate remedy for the Site by rejecting the cleanup standards and remedies chosen by EPA and imposing their own alternative standards and remedies.

Second, CERCLA manifests a congressional objective to prevent multiple, conflicting remedies at a Superfund site because they interfere with EPA’s cleanup and can exacerbate the contamination. Sections 113(h) and 122(e)(6) were added to CERCLA in large part to prevent conflicting remedies that undermine EPA’s cleanup effort. Even if those provisions did not, by their terms, bar Plaintiffs’

restoration claim, they reflect an unambiguous congressional intent to foreclose any state-law claim that challenges or obstructs EPA's remedy at a Superfund site. As the United States has explained, Plaintiffs' proposed restoration would "prevent EPA from fully implementing its cleanup" (APP-0553), and "could make [EPA's] remedies difficult or impossible to achieve." (APP-0554.)

Third, Congress made the policy choice to limit the role of private citizens in the remedy-selection process to public review and comment before the remedy is selected, 42 U.S.C. § 9617, and to citizen suits challenging EPA's selected remedy after the cleanup is completed. 42 U.S.C. § 9659(a)(2). Congress intended to allow public participation during EPA's remedy-selection process, but also to protect EPA's chosen remedy from interference or challenge during the pendency of the cleanup. Even before §§ 113(h) and 122(e)(6) were added to the statute in 1986, federal courts uniformly recognized that CERCLA implicitly barred challenges to the remedy or remedy-selection process until the remedy was fully performed. *See Alabama v. EPA*, 871 F.2d 1548, 1558 (11th Cir. 1989) ("Prior to the 1986 amendments that enacted section 113(h), courts uniformly held that challenges to a Record of Decision were barred before full implementation."); *see, e.g., Lone Pine Steering Comm. v. EPA*, 777 F.2d 882, 887 (3d Cir. 1985) ("[W]e

find in § 9604 an implicit disapproval of pre-enforcement judicial review.”)<sup>11</sup> The same logic applies here to preempt Plaintiffs’ restoration claim. Congress defined a specific role for the public in the Superfund remedy-selection process, and a means for seeking judicial review of EPA’s remedy-selection decisions. Plaintiffs may not circumvent the framework Congress established.

Accordingly, “EPA has determined that [Plaintiffs’] restoration damages conflict with the EPA remedy,” (APP-0562), and the United States has determined that they “also conflict with Congressional objectives” of requiring EPA to select and implement a remedy through the CERCLA process. (APP-0553.) As the agency with congressionally delegated authority to enforce the CERCLA statute, EPA is “uniquely qualified to comprehend the impact of state requirements,” and thus, its views are entitled to “some weight” in the conflict preemption analysis. *Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861, 882 (2000) (quotations omitted).

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<sup>11</sup> The Senate Report accompanying the 1986 CERCLA amendments explained the rationale for this:

[P]re-enforcement review would be a significant obstacle to the implementation of response actions and the use of administrative orders. Pre-enforcement review would lead to considerable delay in providing cleanups, would increase response costs, and would discourage settlements and voluntary cleanups.

S. Rep. No. 99-11, at 58 (1985).


Because it is impossible for Plaintiffs to both pursue their restoration claim and comply with federal regulations, and because Plaintiffs' proposed remedy "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Vitullo*, ¶ 14, it is barred by conflict preemption.

### CONCLUSION

For the foregoing reasons, Atlantic Richfield respectfully requests that the Court exercise supervisory control and vacate the district court's August 30, 2016 Order, and remand with instructions to enter judgment in favor of Atlantic Richfield on Plaintiffs' claim for restoration damages.

Dated this 17th day of November, 2016.

Respectfully submitted,

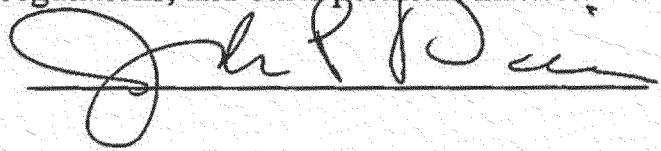
  
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## CERTIFICATE OF COMPLIANCE

Pursuant to Rules 11 and 14(10) of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced except for footnotes and for quoted and indented material; and contains 9659 words, excluding the table of contents, table of authorities, certificate of service, certificate of compliance, and any appendix containing statutes, rules, regulations, and other pertinent matters.

A handwritten signature in black ink, appearing to read "John P. Dan", is written over a solid horizontal line.

## CERTIFICATE OF SERVICE

I hereby certify that on November 17, 2016, I served true and accurate copies of the foregoing PETITIONER'S OPENING BRIEF by depositing said copies into the U.S. mail, first-class postage prepaid, addressed to the following:

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